

IN THE  
MISSOURI SUPREME COURT

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TERRANCE ANDERSON,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC 87060
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY, MISSOURI  
THIRTY-SECOND JUDICIAL CIRCUIT, DIVISION ONE  
THE HONORABLE WILLIAM SYLER, JUDGE

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APPELLANT’S REPLY BRIEF

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## **JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS**

Both original Statements are incorporated here.

**POINTS RELIED ON**

**I.**

**COUNSEL FAILED TO OBJECT - ENGLISH'S TESTIMONY**

**VIOLATED §552.020.14**

The motion court clearly erred denying the claim that counsel was ineffective for failing to object to respondent calling English in guilt rebuttal in that counsel should have objected because:

- (A) §552.020.14 prohibited English from testifying to statements Terrance made and information English received;
- (B) a necessary prerequisite to applying the curative admissibility doctrine is the presentation of “inadmissible” evidence and no “inadmissible” evidence was presented;
- (C) even if curative admissibility somehow applies, the state was only allowed to present evidence of the same type or character as the “inadmissible” evidence and it violated that limitation; and
- (D) English’s testimony prejudiced Terrance because English testified that his evaluation showed Terrance was not suffering from a mental disease or defect and respondent repeatedly relied on English’s conclusions to argue Terrance had not acted with a diminished capacity.

*State v. Mozee*, 112 S.W.3d 102 (Mo.App., W.D. 2003);

*Wilson v. Burke*, 202 S.W.2d 876 (Mo. 1947);

*State ex rel. Missouri Highway and Transportation Commission v. Matula,*

910 S.W.2d 355 (Mo.App.,E.D. 1995);

*State v. Tyler*, 676 S.W.2d 922 (Mo.App.,E.D. 1984);

§552.020.14

§552.020;

§552.030;

*1 Wigmore Evidence* § 15 (Tillers rev. 1983); and

MAI-CR3d 306.04.

## **II.**

### **JUROR DORMEYER COULD NOT FAIRLY SERVE**

The motion court clearly erred denying the claim that trial counsel was ineffective for failing to move to strike for cause Juror Dormeyer on the grounds that he would require that the defense prove that life without parole was appropriate and he was an automatic death penalty juror because

(A) under this Court’s decision in *Knese v. State* an unqualified juror serving is structural error and the presence of structural error establishes *Strickland* prejudice;

(B) counsel did not strategically decide to leave Dormeyer on the jury, but left Dormeyer on the jury because of a note taking error; and

(C) counsel’s presentation of some mitigating evidence did not cure the prejudice because Dormeyer was an automatic death penalty juror who improperly imposed on the defense the burden of “persuad[ing]” and “convince[ing]” him that life was the appropriate punishment.

*Knese v. State*, 85 S.W.3d 628 (Mo. banc 2002);

*Arizona v. Fulminate*, 499 U.S. 279 (1991);

*Brecht v. Abrahamson*, 507 U.S. 619 (1993);

*Presley v. State*, 750 S.W.2d 602 (Mo.App.,S.D. 1988); and

Rule 29.15.

#### IV.

#### **BRADY VIOLATION - PREVENTING DISCLOSURE RAINWATERS'**

#### **PSYCHIATRIC RECORDS**

The motion court clearly erred denying the claim that respondent failed to satisfy its *Brady* obligations when prosecutor Ahsens advised Abbey Rainwater not to sign a release to obtain her psychiatric treatment records, in that the claim presented on appeal is the same one pled in the amended motion.

*Brady v. Maryland*, 373 U.S. 83 (1963);

*State v. Robinson*, 835 S.W.2d 303 (Mo. banc 1992);

*Wilkes v. State*, 82 S.W.3d 925 (Mo. banc 2002); and

Rule 29.15.

## **ARGUMENT**

### **I.**

#### **COUNSEL FAILED TO OBJECT - ENGLISH'S TESTIMONY**

##### **VIOLATED §552.020.14**

The motion court clearly erred denying the claim that counsel was ineffective for failing to object to respondent calling English in guilt rebuttal in that counsel should have objected because:

- (A) §552.020.14 prohibited English from testifying to statements Terrance made and information English received;
- (B) a necessary prerequisite to applying the curative admissibility doctrine is the presentation of “inadmissible” evidence and no “inadmissible” evidence was presented;
- (C) even if curative admissibility somehow applies, the state was only allowed to present evidence of the same type or character as the “inadmissible” evidence and it violated that limitation; and
- (D) English’s testimony prejudiced Terrance because English testified that his evaluation showed Terrance was not suffering from a mental disease or defect and respondent repeatedly relied on English’s conclusions to argue Terrance had not acted with a diminished capacity.

Section 552.020.14 prohibits evidence of statements and information provided by the accused being evaluated. Yet, respondent would turn §552.020.14 on its head and allow an examiner to testify about a competency to proceed

evaluation to defeat a diminished capacity defense. This Court must reject respondent's argument.

**A. Text of Section 552.020.14**

Section 552.020.14 (emphasis added) provides:

14. **No statement** made by the accused in the course of any examination or treatment pursuant to this section and **no information received** by any examiner or other person in the course thereof, whether such examination or treatment was made with or without the consent of the accused or upon his motion or upon that of others, **shall be admitted in evidence against the accused on the issue of guilt** in any criminal proceeding then or thereafter pending in any court, state or federal. A finding by the court that the accused **is mentally fit** to proceed **shall in no way prejudice** the accused in a defense to the crime charged on the ground that at the time thereof he was afflicted with a mental disease or defect excluding responsibility, nor shall such finding by the court be introduced in evidence on that issue **nor otherwise be brought to the notice of the jury.**

**B. English's Testimony On Statements Terrance Made**

**And Information Received**

English testified at his pretrial deposition: "I mean, in my report here, he **told me** he wasn't under any, you know, particular severe emotional stress or wasn't having any particular problems at the time [of the offense]." (Ex.4 at

1255)(emphasis added). English testified at trial that Terrance denied having any symptoms of depression, brain damage, or any other mental disease or defect(T.Tr.1588-89;Ex.4 at 1194). English's pretrial deposition and trial testimony establishes that respondent relied on statements Terrance made and information English received.

Then respondent emphasized in closing argument the statements made during the competency evaluation. Respondent argued:

He **told** Dr. English he didn't have any of the symptoms of any of those psychiatric disorders that the experts from the East Coast says he has. (T.Tr.1605) (emphasis added). English's testimony and Ahsens' argument were extremely prejudicial. Respondent used Terrance's statements to English against him to contradict the defense experts' findings that he had suffered from a mental disease or defect that caused him to have acted with a diminished capacity.

Dr. English's testimony violated §552.020.14 because statements and information received from Terrance were admitted against him on the issue of guilt. Respondent's closing argument that Terrance had "told" English he did not have any symptoms that were consistent with a mental disease or defect, illustrates the prejudice.

Respondent tells this Court that English "did not testify to any statements that Anderson made to him..."(Resp.Br.22). Respondent's brief is inaccurate. English's testimony derived from information and statements made to English during the competency evaluation. Respondent violated the plain language of

§552.020.14: “no information received by any examiner ...shall be admitted in evidence against the accused on the issue of guilt....”

*State v. Grubbs*, 724 S.W.2d 494 (Mo. banc 1987) does not support the admission of English’s testimony(Resp.Br.21). In *Grubbs*, none of Grubbs’ statements from his evaluation were admitted. *Id.* at 499.

Likewise, *State v. Jaynes*, 949 S.W.2d 633 (Mo. App., E.D. 1997), does not apply(Resp. Br.21) since it involved a §552.030 evaluation, not a competency to stand trial evaluation under §552.020. Jaynes relied on a defense of not guilty by reason of insanity under §552.030. *Id.* at 635. Unlike §552.020, at issue here, §552.030 allows evidence of the defendant’s statements on the issue of the defendant’s mental condition. *Id.* at 638. Jaynes’ statements were admitted to question the examining doctor about his opinion as it related to his view on Jaynes’ responsibility. *Id.* at 638. Additionally, in *Jaynes*, the jury was given limiting instruction MAI-CR3d 306.04 directing that it could not consider Jaynes’ statements for whether Jaynes did or did not commit the acts charged. *Id.* at 638. In Terrance’s case not only was the jury not given a limiting instruction (T.L.F.981-97), but also the prosecutor argued that the jury should reject his diminished capacity defense based on statements from the competency evaluation(T.Tr.1605).

### **C. Pincus’ Testimony About English’s Testing**

Moreland asked Pincus whether he had reviewed English’s report and Pincus acknowledged that he had reviewed it(T.Tr. 1446-47). Pincus testified that

he and English both gave Terrace similar tests(T.Tr.1447). For the tests results, Pincus and English obtained similar test results(T.Tr.1447).

English asked Terrace to explain two proverbs and Pincus recounted Terrace's answers(T.Tr.1448-49). Pincus stated the correct interpretation to be given the proverbs and opined that Terrace's answers to English were so concrete and lacking in abstraction that they reflected brain dysfunction(T.Tr.1449).

Pincus testified that he reviewed the I.Q. testing that English did (T.Tr. 1450). English only gave four of eleven parts of an I.Q. test and those parts do not assess those areas of the brain where Pincus found dysfunction, the frontal lobe(T.Tr.1450).

Pincus testified that English tested Terrace's reading ability and both found Terrace reads at a sixth grade level(T.Tr.1450).

English summarized Terrace's history based on what Terrace told him(T.Tr.1450-51). Pincus indicated that Terrace gave him the same history(T.Tr.1450-51).

On cross-examination, the prosecutor elicited from Pincus that even though Pincus and English obtained similar test results that they disagreed as to the conclusions to be drawn from those results(T.Tr.1456).

**D. Curative Admissibility Is Inapplicable Because**  
**No Inadmissible Evidence Was Presented**

“The ‘curative admissibility doctrine’ only applies after one party introduces inadmissible evidence.” *State v. Mozee*, 112 S.W.3d 102, 109 (Mo.

App., W.D. 2003) (relying on *State v. Middleton*, 998 S.W.2d 520, 528 (Mo. banc 1999)). In order for the curative admissibility doctrine to apply, “a party seeking to admit otherwise inadmissible evidence under [it] is limited to admitting evidence that rebuts or explains negative inferences arising from the inadmissible evidence previously introduced by the other party.” *Mozee*, 112 S.W.3d at 109 (relying on *State v. Shurn*, 866 S.W.2d 447, 458 (Mo. banc 1993)).

Respondent claims that English’s testimony was admissible under the curative admissibility doctrine without recognizing its limits(Resp.Br.22-24). Nowhere does respondent identify any testimony presented through Pincus that was “inadmissible.”

It was permissible for defense counsel to inquire on his examination of Pincus about the matters set forth above relating to English’s competency to proceed. That evidence was proper admissible evidence.

“The primary rule of statutory construction is to give effect to legislative intent as reflected in the plain language of the statute.” *State v. Blocker*, 133 S.W.3d 502, 504 (Mo. banc 2004). This Court does not have the authority to write an exception into a statute because that is the Legislature’s function. *Wilson v. Burke*, 202 S.W.2d 876, 878 (Mo. 1947). In *Wilson*, this Court declined to write in an exception to a statute that prohibited granting a liquor license to someone who had certain kinds of convictions so that someone who had entered a nolo contendere plea to such an offense would be eligible to obtain a liquor license. *Id.* at 876-78. *See, also, State ex rel. Bier v. Bigger*, 178 S.W.2d 347, 350-51 (Mo.

banc 1944) (“it is not the duty or the right of the courts to write new provisions into [a] statute.”). “We can write neither the statute nor our philosophy with respect to how we may believe the legislature should have written the statute.” *Wilson v. Burke*, 202 S.W.2d at 878.

Section 552.020.14 prohibits the admission of statements and information received by an examiner “**against** the accused on the issue of guilt.” Respondent wants this Court to ignore the plain language of §552.020.14 which prohibits evidence “against” a defendant. *See Blocker*. Respondent asks this Court to write an exception into §552.020.14, something this Court has consistently refused to do. *Wilson, supra*.

Respondent cites cases regarding curative admissibility, but fails to recognize their requirement that the opposing party must have offered “inadmissible” evidence (Resp. Br.22-24). In *State v. Shurn*, 866 S.W.2d 447, 457 (Mo. banc 1993), defense counsel elicited on cross-examination of a police officer that the homicide victim’s briefcase contained a gun. The state then called a police officer to testify that the victim had said that he had started carrying a gun because he had heard about a plan to kill him. *Id.* at 457. The trial court overruled defense objections to the officer’s later testimony and relied on the state of mind exception to the hearsay rule. *Id.* at 457. The State argued that its evidence was admissible because defense counsel had opened the door to it and relied on two cases from this Court that had applied the curative admissibility doctrine. *Id.* at 458. This Court stated that the curative admissibility applies to “where the defendant

introduces inadmissible evidence, the state may then use evidence--even if inadmissible-- to explain or counteract any negative inference raised by the defendant's inadmissible evidence. *1 Wigmore Evidence* § 15 (Tillers rev. 1983).” *Shurn*, 866 S.W.2d at 458. The curative admissibility doctrine did not apply in *Shurn* because defense counsel’s evidence that the victim had possessed a gun was admissible evidence to show the victim was the aggressor. *Shurn*, 866 S.W.2d at 458. *See also, State v. Green*, 639 S.W.2d 128,130-31 (Mo. App., E.D. 1982) (curative admissibility doctrine did not apply because no improper evidence was admitted and therefore there was nothing to be neutralized through applying the doctrine). Thus, the two decisions the state relied on from this Court in *Shurn* that applied the curative admissibility doctrine, *State v. Lingar*, 726 S.W.2d 728 (Mo. banc 1987) and *State v. Starr*, 492 S.W.2d 795 (Mo. banc 1973), were inapplicable. *See Shurn*, 866 S.W.2d at 457-58. This Court did conclude that the evidence in *Shurn* was properly admitted under the state of mind exception to the hearsay rule. *Shurn*, 866 S.W.2d at 458.

In *Shurn*’s co-defendant’s case, the same evidentiary issue of why the victim was carrying a gun was raised on appeal two years later. *State v. Weaver*, 912 S.W.2d 499, 510-11 (Mo. banc 1995). This Court decided that the victim’s statements again were properly admitted under the state of mind exception to the hearsay rule and not the curative admissibility doctrine and again distinguished *Lingar*. *Weaver*, 912 S.W.2d at 510-11.

In *Weaver*, this Court did find other evidence was properly admitted under the curative admissibility doctrine, but did so because *Weaver* had introduced inadmissible evidence. *Weaver*, 912 S.W.2d at 516. There, *Weaver* had offered inadmissible evidence intended to explain his prior arrests were unjustified. *Id.* at 516. For that reason, it was proper for the State to then delve into *Weaver*'s arrests. *Id.* at 516. Similarly, in *State v. Middleton*, 998 S.W.2d 520, 528 (Mo. banc 1999) this Court, citing *Shurn* for the requirement that the defendant must have first injected inadmissible evidence, concluded evidence the state admitted there was properly admitted under the doctrine. Likewise, relying on *Weaver* and *Lingar*, this Court in *State v. Armentrout*, 8 S.W.3d 99, 111 (Mo. banc 1999) concluded that because the defense had injected inadmissible hearsay evidence on cross-examination the state could then counter with its own hearsay evidence under the doctrine.

**E. Even if Curative Admissibility Applied Respondent Presented Evidence That Doctrine Did Not Allow**

When improper evidence is admitted, the curative admissibility doctrine requires the countering evidence “to be of the same type or character as the earlier inadmissible evidence.” *State ex rel. Missouri Highway and Transportation Commission v. Matula*, 910 S.W.2d 355, 361 (Mo. App., E.D. 1995). *See also*, *Koontz v. Ferber*, 870 S.W.2d 885, 894 (Mo. App., W.D. 1993) (same).

In *Mozee*, an undercover narcotics officer and an informant together made a drug buy from “Lee.” *Mozee*, 112 S.W.3d at 104-05. The informant was unable

to provide the officer with “Lee’s” name. *Id.* at 105. Based on viewing a photograph that the Highway Patrol provided, the officer identified Mozee as the seller. *Id.* at 105. On cross-examination of the officer, defense counsel elicited that the informant was unable to provide the officer with the seller’s name at the time of the buy which fell within the hearsay exception of explaining the officer’s subsequent conduct. *Id.* at 106, 109. On redirect, the state elicited hearsay evidence that the informant had viewed a photo and identified Mozee as the seller. *Id.* at 106-08. The state’s evidence was not admissible under the curative admissibility doctrine because the defense had not presented any inadmissible evidence. *Id.* at 109. Additionally, the state’s evidence was improper because the evidence of the informant’s photo identification did not rebut in any way the defense evidence that the informant did not know the seller’s name at the time of the drug buy. *Id.* at 110.

In *State v. Tyler*, 676 S.W.2d 922, 923, 925 (Mo. App., E.D. 1984), the defendant was convicted of attempted robbery. The defendant had confronted a store’s employee in the parking lot with a handgun, forced her to return inside the store, and was apprehended by the police while the store’s safe was being opened. *Id.* at 924. On cross-examination, a police officer indicated there was nothing in the officer’s report as to whether the victim’s purse was taken. *Id.* at 925. On redirect, the state presented hearsay testimony that the victim had told the officer that the defendant had threatened to kill her and that she heard his gun click as though it had misfired. *Id.* at 925-26. The state’s curative admissibility argument

was rejected because the state exceeded the limited application of the doctrine because the only issue the defendant had presented was the theft of the purse whereas the state went into the death threat and the gun clicking. *Id.* at 925.

Respondent's evidence from English was not of the same type or character of evidence presented through Pincus. Pincus' testimony was limited to his and English's tests and test results(T.Tr.1446-47,1450). Pincus explained how these tests supported his conclusions(T.Tr.1448-49). If respondent was allowed to present curative evidence, then it should have been of this same type or character. *See Matula* and *Ferber*. Instead, respondent presented through English his opinions and reasons for concluding that Terrance's actions were not the product of a mental disease or defect(T.Tr.1542,1590). Like the evidence in *Moze* and *Tyler*, respondent's evidence here went beyond what Pincus testified about as to English and was not of the same type or character.

Respondent's assertion that "Dr. Pincus left the unstated impression that Dr. English agreed with his findings." (Resp. Br.23) is unsupported. The record refutes that impression was left with the jury. On respondent's cross-examination of Pincus, it established that even though Pincus and English obtained similar test results, they disagreed as to the conclusions drawn from those results(T.Tr.1456).

Respondent also asserts, without any record citation, that defense counsel asked Pincus to comment on and interpret English's report(Resp.Br.23). The record shows that counsel never asked Pincus such things.

#### **F. Terrance Was Prejudiced**

At trial, respondent emphasized English's testimony to show that Terrance had no mental disease or defect, that he did not suffer from diminished capacity. Now, on appeal, respondent wants to ignore those arguments and suggest that English's testimony was unimportant. The record belies respondent's argument:

Did he know what he was doing? Absolutely. Absolutely. Is there mental disease or defect? No. **He told Dr. English he didn't have any of the symptoms of any of those psychiatric disorders that the experts from the East Coast says he has.**

(T.Tr.1605).

English's testimony was prejudicial. The jury heard English's belief that Terrance did not suffer from a mental disease or defect, and therefore, he had not suffered from a diminished capacity. The prejudice was driven home for the jury when Ahsens argued that the jury should reject Terrance's diminished capacity defense based on English's conclusions.

Counsel unreasonably failed to object to English's testimony. A new trial should result.

## **II.**

### **JUROR DORMEYER COULD NOT FAIRLY SERVE**

The motion court clearly erred denying the claim that trial counsel was ineffective for failing to move to strike for cause Juror Dormeyer on the grounds that he would require that the defense prove that life without parole was appropriate and he was an automatic death penalty juror because

(A) under this Court’s decision in *Knese v. State* an unqualified juror serving is structural error and the presence of structural error establishes *Strickland* prejudice;

(B) counsel did not strategically decide to leave Dormeyer on the jury, but left Dormeyer on the jury because of a note taking error; and

(C) counsel’s presentation of some mitigating evidence did not cure the prejudice because Dormeyer was an automatic death penalty juror who improperly imposed on the defense the burden of “persuad[ing]” and “convince[ing]” him that life was the appropriate punishment.

Juror Dormeyer was not qualified to serve because he was an automatic death penalty juror and he would require the defense to “persuade” and “convince” him that life was appropriate. Defense counsel knew Dormeyer was unqualified. They acted unreasonably and failed to strike Dormeyer for cause because of a note taking error.

#### **A. A Finding Of Structural Error Is *Strickland* Prejudice**

Respondent asserts Terrance is required to establish prejudice under *Strickland v. Washington*, 466 U.S.668, 687 (1984) and that was not done(Resp.Br.29-31,39-40). Under *Strickland* to establish ineffectiveness, a movant must demonstrate counsel failed to exercise the customary skill and diligence reasonably competent counsel would have exercised and he was prejudiced. *Id.* at 687. This Court's decisions, however, show that in the context of jury selection the prejudice analysis differs.

In *Knese v. State*, 85 S.W.3d 628, 631-33 (Mo. banc 2002), this Court found that counsel was ineffective for failing to move to strike for cause two jurors who were automatic death penalty jurors. Knese's counsel reviewed the juror questionnaires, but failed to review those questionnaires submitted on the morning of trial, which included the two automatic death penalty jurors. *Id.* at 632.

This Court began its analysis in *Knese* by finding that counsel failed to satisfy *Strickland's* performance prong when the two jurors were left on the jury. *Knese*, 85 S.W.3d at 632-33. Immediately following that analysis this Court stated:

This complete failure in jury selection is a structural error. *Gray v. Mississippi*, 481 U.S. 648, 668 (parallel citations omitted) (1987); cf. *Arizona v. Fulminate*, 499 U.S. 279, 310 (parallel citations omitted) (1991). On direct appeal, the United States Supreme Court, as a "per se rule," requires vacating a death sentence imposed by a jury whose composition is affected by *Witherspoon* error.

*Knese*, 85S.W.3d at 633. After noting that structural error had happened, and that “per se” reversal was required, this Court then proceeded in *Knese* to find that *Strickland* prejudice had occurred because there was a reasonable probability to undermine confidence in the outcome. *Id.* at 633.

Structural error in the constitution of the trial mechanism “requires automatic reversal of the conviction because they infect the entire trial process.” *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993). A trial in which structural error has occurred “cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.” *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). A trial in which structural error has occurred is also one in which there is a *Strickland* reasonable probability to undermine confidence in the outcome. *See Knese*. That is so because the result cannot reliably accomplish its function for determining guilt or innocence and no punishment can be viewed as fundamentally fair. *See Fulminante*.

Contrary to respondent’s assertions (Resp.Br.30-31), the decisions in *Presley v. State*, 750 S.W.2d 602 (Mo.App.,S.D. 1988) and *Johnson v. Armontrout*, 961 F.2d 748 (8th Cir. 1992) are not inconsistent with a finding of *Strickland* prejudice. The reason those cases found *Strickland* prejudice is presumed, when an unqualified juror serves, is that *Strickland* prejudice which requires a reasonable probability to undermine confidence in the outcome and *Fulminante*’s analysis of structural error as creating a circumstance which “cannot

reliably serve” as a vehicle for determination of guilt or innocence are equivalent.

The right to a jury trial “guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.” *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). “‘An ‘impartial jury’ is one where *each and every one* of the twelve members constituting the jury is totally free from any partiality whatsoever.’” *Presley v. State*, 750 S.W.2d at 606 (emphasis in *Presley*) (quoting *Mares v. State*, 490 P.2d 667, 668 (N.M. 1971)). The *Strickland* prejudice to Terrance is that a biased juror who would automatically vote for death and require the defense to “persuade” and “convince” him that life was the appropriate punishment served on his jury. *See Presley*.

The decision in *Bell v. Cone*, 535 U.S. 685 (2002) does not apply here(Resp.Br.30-31). In *Bell*, the Court concluded that it was not appropriate to presume prejudice for counsel’s failure to present mitigation evidence and waive closing argument. *Id.* at 696-97. The Court explained that the decision in *United States v. Cronin*, 466 U.S. 648 (1984), that recognized sometimes prejudice can be presumed, was limited to the situation where counsel completely and entirely failed to subject the prosecution’s case to meaningful adversarial testing. *Bell*, 535 U.S. at 696-97. *Bell* is unlike *Presley*, *Johnson*, *Knese*, and Terrance’s case because it did not involve a situation that involved structural error. When a court is confronted with a structural error, then *Strickland* prejudice exists and can be presumed because *Strickland* prejudice is the same as *Fulminante*’s analysis that

the presence of structural error is not a reliable determination of guilt or innocence. In Terrance's case, like *Knese*, there was not a reliable determination of a punishment of death and counsel was ineffective. Moreover, under *Fulminante's* analysis of structural error, as applied to ineffective assistance of counsel, *Presley* and *Johnson* were not wrongly decided.

**B. It Was Not Counsels' Strategy To Leave**

**Dormeyer On The Jury**

Moreland testified it was not his strategy to leave Dormeyer on the jury and Dormeyer was left on because of a note taking oversight by co-counsel(Moreland Depo.#1 at 13,56-57). In fact, Moreland was "shocked" they had not moved to strike Dormeyer for cause or used a peremptory to remove him(Moreland Depo.#1 at 12-13). McBride testified that they should have moved to strike Dormeyer for cause because he testified that he would automatically vote for death and require the defense to prove that Terrance should not be sentenced to death(H.Tr.249-51). McBride testified that there was no strategic reason for failing to move to strike Dormeyer(H.Tr.251).

Despite counsel's testimony, respondent claims that it must have been counsel's strategy to leave Dormeyer on the jury because counsel "aggressively questioned every venire panel"(Resp. Br.31). But what good is aggressive questioning, if counsel fails to utilize the information gained. Counsel forthrightly admitted their error in failing to strike Dormeyer, a juror who favored death and

could not presume a life sentence. When counsel is negligent in failing to strike biased jurors they will be found ineffective.

In *State v. McKee*, 826 S.W.2d 26, 28 (Mo. App., W.D. 1992) counsel was found ineffective for failing to strike a venireperson who would require the defendant testify. Counsel failed to strike the unqualified juror because counsel had confused the testimony of the unqualified juror with another juror who would not require that the defendant testify. *Id.* at 28. In *Knese*, counsel failed to strike the two unqualified jurors because of his oversight in not reviewing juror questionnaires submitted on the morning of trial. *Knese*, 85 S.W.3d at 632. *McKee* and *Knese* had nothing to do with the thoroughness of counsels' questioning or how "aggressive" counsel was in their questioning, but rather counsels' failure to strike biased jurors. In *McKee*, like here, counsel elicited the disqualifying testimony from the juror who served, but who was still left on the jury. *McKee*, 826 S.W.2d at 27-28.<sup>1</sup> The "aggressiveness" of counsel's questioning does not demonstrate it was counsels' strategy to leave Dormeyer on the jury. Rather, it shows just the opposite. Having gained information of bias, counsel had a duty to strike that biased juror.

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<sup>1</sup> *McKee* is also significant because it rejected a motion court strategy finding as unsupported by the evidence because, like here, counsel testified there was no strategic reason for leaving an unqualified juror on the case (*See App.Br. discussion at 67*).

Respondent misrepresents the record stating that “Moreland had a conversation with juror Dormeyer about what Dormeyer might do if the defense did not put on evidence in the penalty phase” (Resp. Br. 32). Prior to the questioning of Dormeyer defense counsel had attempted to ask JoAnn Williams if she could consider life, if the defense presented no evidence(See App.Br. 59-60, 69 relying on T.Tr. 564-70). In response to the prosecutor’s objection, the court directed defense counsel not to ask jurors to assume that hypothetical (T.Tr.564-70). Therefore, counsel never asked Dormeyer that hypothetical(T.Tr.576-78).<sup>2</sup>

The respondent criticizes trial counsel for admitting their mistake in not striking Dormeyer(Resp.Br.33-34). Respondent suggests that trial counsel might be trying to admit their error simply to help their client(Resp.Br.33-34). The record refutes respondent’s argument because it shows that Dormeyer favored death and would require the defense to persuade him that life was appropriate.

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<sup>2</sup> The record for the entire voir dire and strikes for cause for Dormeyer’s panel is found at T.Tr.523-91. The original brief noted that for Dormeyer’s panel Ahsens, and not Moreland, first injected the hypothetical of the defense presenting no evidence(See App.Br. 60 n.5 relying on T.Tr. 532-33). Ahsens also injected this hypothetical a second time to Dormeyer’s panel when Ahsens asked venireperson Mr. Joyce the following: “You understand that even if you receive no evidence from the defense at all, you must still be willing to consider the life in prison without parole option?”(T.Tr.541).

Under these circumstances, counsel had to admit their mistake in not striking Dormeyer. To intentionally leave Dormeyer on the jury would have been an unreasonable strategy.

Respondent seeks to portray the claim as grounded in counsel having merely “forgot” to strike Dormeyer and argues it must have been counsels’ strategy to leave Dormeyer on the jury(Resp.Br.33-34). Moreland relied on co-counsel to take notes to identify which jurors to move to strike for cause(Moreland Depo.#1 at 56-57). Moreland must rely on co-counsel to take complete notes because when he is speaking to so many people he cannot remember whom they should later move to strike for cause(Moreland Depo.#1 at 57). However, co-counsel’s notes, did not identify Dormeyer as someone to move to strike for cause (Moreland Depo. #1 at 57). Because of this error counsel did not move to strike Dormeyer for cause(Moreland Depo. #1 at 57). Terrance’s counsels’ actions here are no different than McKee’s counsel who confused which juror should be struck for cause and Knese’s counsel who overlooked reviewing juror questionnaires submitted on the day of trial. *See McKee* and *Knese, supra*. The respondent cannot support its claim of strategy because it is contrary to the record. Counsel failed to strike a biased juror, pure and simple.

### **C. Presenting Some Mitigation Did Not Cure Error**

Respondent makes the shocking suggestion that an automatic death penalty juror who would not follow the law and would require the defense to prove death was not appropriate becomes qualified if the defense tries to meet the unlawful

burden(Resp.Br.36-37). According to respondent, a motion to strike Dormeyer for cause would not have been sustained because Dormeyer was going to get to hear mitigating evidence(Resp.Br.36-37). Dormeyer was not qualified to serve because as to punishment he shifted the burden to the defense to “persuade” and “convince” him that life was the appropriate punishment(T.Tr.576-78). That counsel intended to present some mitigating evidence did not cure the reasons why Dormeyer was unqualified to serve.

Respondent analogizes counsel having presented some mitigation evidence to cases that have held that a defendant was not prejudiced by jurors who served that would require that the defendant testify when the defendant then testified(Resp. Br.37-40). Dormeyer was unqualified to serve because he shifted the burden to the defense to “persuade” and “convince” him that life was the appropriate punishment and he was an automatic death penalty juror. Unlike the cases respondent cites, Dormeyer hearing some mitigation did not cure his views on allocating the burden to defense counsel to persuade him that life was the appropriate punishment and that he was an automatic death penalty juror.

A biased juror served on the jury due to counsels’ unreasonable failure to strike him. This Court should order a new penalty phase.

#### IV.

#### **BRADY VIOLATION - PREVENTING DISCLOSURE RAINWATERS'**

#### **PSYCHIATRIC RECORDS**

**The motion court clearly erred denying the claim that respondent failed to satisfy its *Brady* obligations when prosecutor Ahsens advised Abbey Rainwater not to sign a release to obtain her psychiatric treatment records, in that the claim presented on appeal is the same one pled in the amended motion.**

Terrance has argued that respondent violated its duty under *Brady v. Maryland*, 373 U.S.83, 87 (1963) and this Court's application of *Brady* in *State v. Robinson*, 835 S.W.2d 303, 306 (Mo. banc 1992) when Ahsens advised Abbey Rainwater not to sign a release to obtain her psychiatric treatment records(See App.Br.93-104). According to respondent, the claim now presented to this Court was not raised in the pleadings because the pleadings did not mention Ahsens having advised Abbey Rainwater to refuse to sign a release to obtain her psychiatric records(Resp. Br.47).

The pleadings alleged that respondent failed to disclose Abbey Rainwater's and Mr. and Mrs. Rainwater's psychiatric and psychological treatment records(L.F.25,55). The information contained in those records was relevant to the circumstances of the offense(L.F.25,55). Terrance was prejudiced by the state withholding this information because it would have shown that Terrance was less culpable in the Rainwaters' deaths and Terrance would not have been convicted of

first degree murder or not sentenced to death(L.F.25-26,55-56). Trial counsel made a discovery request for statements, memoranda, or records relating to the subject matter of Terrance's case(L.F.56). The state did not provide counsel any statements that Abbey Rainwater or Mr. and Mrs. Rainwater had made to any mental health professional(L.F.56). The pleadings cited *Brady*(L.F.57). The pleadings also stated: "the duty to disclose exculpatory evidence has been held to include the psychiatric records of the victim. State v. Robinson, 835 S.W.2d 303, 306(Mo. banc 1992)." (L.F.58). Disclosure of the Rainwaters' psychiatric records was critical because of their close relationship to Terrance and the events that gave rise to Mr. and Mrs. Rainwaters' deaths(L.F.58). The undisclosed psychiatric records of Abbey Rainwater and her parents was prejudicial because the information they contained would have persuaded the jury not to convict Terrance of first degree murder or not to impose death(L.F.58).

The essence of the claim pled made clear that the state had withheld the psychiatric treatment records of Abbey Rainwater and her parents in violation of *Brady* and this Court's application of *Brady* in *Robinson*. The mechanism through which respondent accomplished withholding the Rainwaters' psychiatric treatment records was Ahsens advising Abbey Rainwater not to sign a release to obtain her psychiatric records(See App.Br.95-96). The means Ahsens used to accomplish withholding the Rainwaters' treatment records in violation of *Brady* and *Robinson* is not a different claim. The claim that was pled is the same one now briefed to this Court.

This Court should reject respondent's argument for the same reasons this Court ruled the pleadings in *Wilkes v. State*, 82 S.W.3d 925, 927-30 (Mo. banc 2002) were sufficient to require an evidentiary hearing. This Court recognized that "[n]othing in the text of Rule 29.15 suggests that the pleading requirements are to be construed more narrowly than other civil pleadings." *Id.* at 929. Further, a hearing was required because the allegations were "sufficient to apprise the motion court of Wilkes' claims and to meaningfully assess those claims under the *Strickland* test." *Id.* at 929. This Court refused to accept the state's arguments opposing a hearing because that "would require this Court to abandon a common sense reading of Wilkes' allegations." *Id.* at 929.

The allegations set forth in Terrance's pleadings clearly apprised the motion court that the State had acted to withhold the treatment records of Abbey Rainwater and her parents in violation of *Brady* and this Court's decision in *Robinson* applying *Brady*. That the means Ahsens pursued in withholding these treatment records, advising Abbey not to consent to releasing her records, is not a different claim. To adopt the state's position would be to abandon a common sense reading of Terrance's pleadings. *Cf. Wilkes*.

This Court should find that the claim briefed here is the same contained in the pleadings. A new trial or at a minimum a new penalty phase is required.

## **CONCLUSION**

For the reasons discussed in the original brief and this reply brief, Terrance Anderson requests: Points I, IV, V, VI, VII a new trial; Points II, III, IV, V, VI, VIII a new penalty phase; and Points IX and X impose life without parole.

Respectfully submitted,

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**Certificate of Compliance and Service**

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the reply brief contains \_\_\_\_\_ words, which does not exceed twenty-five percent of the 31,000 words allowed (7,750) for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in March, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed this \_\_\_\_ day of \_\_\_\_\_, 2006, to Office of the Missouri Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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William J. Swift